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Highway Law as Affecting Common Law Liability of Owner of Motor Vehicle (Arcara v. Moresse, 258 N.Y. 211 (1932))

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There having been no "sale" of the leased property, the right of the grantee corporation to hold the security given by the bond has not terminated and the obligation of the surety remains in force.

T. J. M.

HIGHWAY LAW AS AFFECTING COMMON LAW LIABILITY OF OWNER OF MOTOR VEHICLE.—Defendant owner loaned his car to his nephew for his nephew's personal use. Contrary to the defendant's express instructions the nephew permitted a friend to drive the defendant's car and, while that friend was driving negligently, the car collided with a car occupied by the plaintiffs. The nephew was in the defendant's car at the time of the collision. *Held,* There was "negligence in the operation" of the defendant's car committed by a "person legally using" it with "the permission" of the defendant so that under §282-e he became liable for damages. *Arcara* v. *Moresse,* 258 N. Y. 211, 179 N. E. 389 (1932).

Section 282-e of the HIGHWAY LAW (now §59 of the VEHICLE AND TRAFFIC LAW, Consol. Laws c. 71) imposes liability upon the owner of every motor vehicle "for death or injuries to person or property resulting from negligence in the operation of such motor vehicle * * * by any person legally using or operating the same with the permission, express or implied, of such owner." An owner who loans his car may reasonably restrict the use to which it may be put and its use for a proscribed purpose is not a use with "the permission" of the owner.[1] However, if the limiting instructions relate to the manner of operation rather than to the use of the car, the use is with "the permission" of the owner, though the limiting instructions be disobeyed.[2] To bind the owner there must be "negligence in the operation" of the motor vehicle but the negligent act may be performed "by any person legally using" the motor vehicle, or by any person "operating the same." Thus the legal user if present in the car, not having abandoned it or its use but merely having surrendered the wheel to another, may be guilty of negligence in "operation" although not "operating" the car in the sense that he is actually driving it. The common law rule is that in general a bailor is not liable to third parties injured by the negligence of his bailee with respect to the article bailed.[3] Prior to the enactment of §282-e an

N. Y. 28, 150 N. E. 591 (1926) and Rosenfeld v. Aaron, 248 N. Y. 437, 162 N. E. 478 (1928).

[1] Poota v. Long Island R. R. Co., 246 N. Y. 388, 159 N. E. 180, 62 A. L. R. 1163 (1927); Chaika v. Vandenberg, 252 N. Y. 101, 169 N. E. 103 (1929).

[2] Grant v. Knepper, 245 N. Y. 158, 156 N. E. 650, 54 A. L. R. 845 (1927).

[3] Bailments, 6 C. J. 1151; Negligence, 45 C. J. 849; Motor Vehicles, 42 C. J. 1078.

owner was not liable for the negligence of a person to whom he had loaned his car, be that person a member of his family, a servant on a personal errand or a stranger.[4]

T. J. M.

INSURANCE—EVIDENCE—ADMISSIBILITY OF PROOF OF CONVICTION FOR FALSE STATEMENT NOT EFFECTIVE AS PLEA IN BAR IN CIVIL ACTIONS.—The plaintiff sued on an insurance policy for a fire loss. The defendant denied liability on the ground that the proof of loss offered by the plaintiff was fraudulent. The plaintiff had in fact been convicted of the crime of presenting a fraudulent proof of loss even before the commencement of the civil action. The defendant reasserted this fact and alleged that the issue of plaintiff's fraud was *res judicata* and a complete bar to his recovery. The plaintiff moved to strike out the defense as invalid. On appeal, *held,* the order striking out the defense of *res judicata* should be affirmed. The prior conviction is not effective as a plea in bar, but may be shown as presumptive proof of the commission of the crime. *Schindler* v. *Royal Insurance Co.,* 258 N. Y. 310, 179 N. E. 711 (1932).

It has long been the established rule in New York that a prior conviction or acquittal in a criminal proceeding is not a conclusive bar to a subsequent trial in a civil action of the same issue of fact as was involved in the criminal prosecution. Thus in an action on the bond of a liquor dealer for permitting the premises to become disorderly, a conviction of the dealer's wife for keeping the premises as a disorderly house was held to be inadmissible to show that it was in fact disorderly.[1] Again, in an action of slander for saying that plaintiff was a thief and stole the defendant's hens, where the record of conviction of the plaintiff was offered in evidence under a plea of justification, the verdict of conviction was held to be merely *prima facie* evidence, which the plaintiff was allowed to controvert.[2] The cases adverted to refer to attempts on the part of defendants in civil actions to bar recovery of the plaintiffs on the ground of their prior criminal convictions. But the rule also operates to prevent plaintiffs who have been acquitted of a crime from offering their acquittal in a civil action as evidence of their innocence. Thus, where a statute designed to prevent deception in the sale of dairy products provided

[4] Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78 (1917); Van Blaricom v. Dodgson, 220 N. Y. 111, 115 N. E. 443 (1917); Fallow v. Swackhamer, 226 N. Y. 444, 123 N. E. 737 (1919); Note (1928) 2 ST. JOHN'S L. REV. 203, 204. For further discussion see Note (1926) 1 ST. JOHN'S L. REV. 53, (1927) 1 ST. JOHN'S L. REV. 202.

[1] Green v. Altenkirch, 176 App. Div. 320, 162 N. Y. Supp. 447 (2d Dept. 1916).

[2] Maybee v. Avery, 18 Johns. 352 (N. Y. 1820).